Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAROLINE ROGERS,

Petitioner,

v.

HORSESHOE ENTERTAINMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The special venue statute of 42 U.S.C. § 2000e-5(f)(3) expressly grants plaintiffs alleging claims under Title VII and the American with Disabilities Act to bring such an action in any judicial district in the State in which the unlawful employment practice is alleged to have been committed.

The question presented is whether the special venue statute of 42 U.S.C. § 2000e-5(f)(3) permits a plaintiff to bring a claim under Title VII or the American with Disabilities Act in any judicial district of a state without being removed on grounds of forum shopping or forum non conveniens where the defendant has not meet its burden of proving an abuse of discretion on the part of a lower court in sustaining the plaintiff's choice of venue.

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Petitioners respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Tyson, R.E.) denying respondents' Motion to Transfer (Pet.App. 23a-27a) is not otherwise published. The court of appeals opinion (per DeMoss, H.R. joined by Barksdale, R.H.) granting respondents Petition for Writ of Mandamus and reversing (Pet.App. 1a-13a) is published at 305 F.3d 354 and the original dissent (per Benavides, F.P. Pet.App. 17a-22a) is published at 305 F.3d 354, 360-362. The court of appeals per curiam opinion treating Petition for Rehearing En Banc as Petition for Panel Rehearing and granting Petition for Panel Rehearing (Pet.App. 15a-16a) is not otherwise published. The court of appeals substituted opinion (per DeMoss, H.R. joined by Barksdale, R.F.) granting respondents Petition for Writ of Mandamus and reversing (Pet.App. 1a-13a) is not otherwise published and the revised dissent (per Benavides, F.P. Pet.App. 14a) is not published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on July 1, 2003. Petitioners invoke this court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the special venue statute of 42 U.S.C. § 2000e-5(f)(3) are reprinted at page 2 and 28 U.S.C. § 1404(a) is reprinted at page 3.

STATEMENT OF THE CASE

In September of 1997, petitioner was employed as a beverage server at the Horseshoe Casino in Bossier City, Louisiana. During the course of her employment with the defendant she was subject to various forms of sexual discrimination prohibited under Federal Law. Suit was filed March 22, 2001 in the Middle District Court of Louisiana pursuant to 42 U.S.C. § 2000e-5(f)(3) as it would be impossible for petitioner to receive a fair trial in the respondents back yard in the Western District of Louisiana.

42 U.S.C. § 2000e-5(f)(3) reads in pertinent:

> (3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action may have been brought.

On or about June 12, 2001 Horseshoe filed a Motion to Transfer in Middle District Court pursuant to 28 U.S.C. § 1404(a) alleging a more convenient forum.

28 U.S.C. § 1404(a) reads in pertinent:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

By Order entered on July 2, 2002, the District Court denied Horseshoe's Motion to Transfer the matter to the Western District of Louisiana based on Judge Ralph Tyson's opinion that although there are conflicting factors for determining venue under Section 1404 "the possibility of delay or prejudice if transfer is granted, the location of counsel, and plaintiff's choice of forum seem to dictate that the requested transfer be denied". Horseshoe then applied for a Writ of Mandamus to the Fifth Circuit Court of Appeals. A three-judge panel consisting of Judges Barksdale, DeMoss, and Benavides heard the matter filing written reasons for judgment on September 10, 2002 overturning the decision of the district court and ordered venue transferred to the Western District of Louisiana based on the majority opinion that the many factors determinative of venue weighed in favor of transferring venue to the Western District court of Louisiana. Judge Benavides dissented providing written reasons for his dissent. Pet.App. 17a-22a. An Order consistent with the majority's decision was filed on September 19, 2002. On September 27, 2002 a Petition for En Banc Review of the three judge panels ruling was filed. On July 1, 2003 a per curiam opinion was issued treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing granting the

Petition for Rehearing. Pet.App. 15a-16a. After review, the three judge panel withdrew their previous opinion filed under date of September 10, 2002, and published at 305 F.3d 354, *et seq.* and filed a new opinion adopting and substituting their previous opinion with the only changes being the courts recitation of the "Pfizer Standards",[1] the deletion and substitution of language further identified in footnote five, and a revised dissent by Judge Benavides. Pet. App. 14a.

This holding merits this Court's immediate review because it will require plaintiffs to litigate matters in the defendants back yard disregarding their right to choose a forum under the special venue statute of 42 U.S.C. § 2000e-5(f)(3) which permits a plaintiff alleging this type of action to be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed. Further, if a claim brought under 42 U.S.C. § 2000e-5(f)(3) is required to withstand a challenge under 28 U.S.C. § 1404(a) based on the convenience of the parties and witnesses, and in the interest of justice then the burden on the party requesting such a transfer must be the highest of

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1. The Fifth Circuit Court added the following language in their substituted opinion. Pet.App. 5a-6a:

Neither Garner nor Pfizer have been overruled or criticized by this Court; and from these cases we draw the following standards (the Pfizer Standards) to be applied by our Court in deciding the propriety or not of a district court's ruling on a motion to transfer under Section 1404(a):

a.) Did the district court correctly construe and apply the relevant statutes;

b.) Did the district court consider the relevant factors incident to ruling upon a motion to transfer; and

c.) Did the district court abuse its discretion in deciding the motion to transfer.

standards otherwise the special venue statute envisioned by congress and designed for the protection of certain plaintiffs has no teeth and is without reason.

1. Petitioner is a female resident of the Western District of Louisiana who was an employee of the defendant as a beverage server. While in the course and scope of her employment petitioner was subjected to sexual innuendos, and sexually orientated remarks of a most egregious nature from the defendant's management on an almost daily basis. Additionally, petitioner was a "qualified individual with a disability" within the meaning and intent of the law. At all times the defendant knew petitioner was disabled, regarded her as disabled and maintained a record of her impairment. The harassment and discrimination continued until July 17, 2000 when Petitioner was constructively discharged.

2. Respondent is a Louisiana partnership operating a casino in Bossier City, Louisiana in the Western District of Louisiana and was at all times the employer of petitioner and those employees subjecting the petitioner to the unwarranted, unsolicited, and unprovoked sexual advances and harassment. The respondent contends that the filing of the petitioner's claim in the Middle District of Louisiana in Baton Rouge, Louisiana is tantamount to forum shopping. Respondent further contends that this matter should only be litigated in the Western District of Louisiana under 28 U.S.C. § 1404(a) as Shreveport, Louisiana is the more convenient forum.

3. The Middle District court considered several factors when denying Horseshoe's claim including the mover's burden of showing why a transfer of venue under Section 1404(a) is warranted, movants necessity of demonstrating

that justice weighs substantially in favor of transfer, the balance of convenience, and that the court must determine if a transfer would make it substantially easier for the parties to litigate the case. Pet.App. 25a (citing *Gundle Lining Const. Corp. v. Fireman's Fund Ins. Co.*, F. Supp. 1163, 1165 (S.D. Tex. 1994). Judge Tyson also stated in his opinion "that trial courts are to consider all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interest of justice be better served by transfer to a different forum. *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir.), *cert. denied*, 493 U.S. 935, 110 S. Ct. 328, 107 L. Ed. 2d 318 (1989) (citation omitted).

Judge Tyson considered the following additional factors when determining the Middle District of Louisiana was the proper venue surviving a forum non conveniens challenge: (1) the availability and convenience of witnesses; (2) the availability and convenience of the parties; (3) the place of the alleged wrong; 4) the location of books and records; (5) the possibility of delay if prejudice is granted; (6) the location of counsel; and (7) the plaintiff's choice of forum. *EEOC v. Mustang Mobile Homes, Inc.*, 88 F. Supp.2d 722, 725 (W.D. Tex. 1999); *Hall v. Environmental Chem.* Co., 64 F. Supp.2d 638, 644 (S.D. Tex. 1999) Pet.App. 25a-26a. After considering all of the above factors, Judge Tyson ruled:

> [s]ince the relevant factors appear to be evenly divided between the two alternatives, the Court finds that defendant has failed to carry its burden of establishing that justice weighs substantially in favor of the requested transfer of venue. Therefore, transfer of this litigation is not warranted and plaintiff's choice of forum will be honored.

Pet.App. 27a.

4. On respondents' appeal, the Fifth Circuit reversed the district court finding that the "District Court erred in concluding that the relevant factors appear to be evenly divided between the two alternatives and that in such circumstance the plaintiff's choice of forum will be honored (citing the Middle District)" for the following summarized reasons: (1) The factor of "location of counsel" is irrelevant and improper for consideration in determining the question of transfer of venue[2];

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2. Judge Benavides disagreed with the majority citing *Fletcher v. Southern Pacific Transp. Co,*. 648 F. Supp. 1400, 1401 (E.D. Tex. 1986) (voluminous internal citations omitted) and the nine factors traditionally employed by Courts to determine whether to transfer venue and noted with particularity the majorities failure to acknowledge the location of counsel as a factor:

(1) Plaintiff's choice of forum

(2) The availability of compulsory process for the attendance of unwilling witnesses.

(3) The cost of obtaining the attendance of willing witnesses.

(4) The accessibility and location of sources of proof.

(5) The location of counsel

(6) The relative congestion of the courts' dockets.

(7) Accessibility of the premises to jury view.

(8) Relation of the community in which courts and the jurors are required to serve the occurrence giving rise to the suit.

(9) The time, cost, and ease with which the trial can be conducted, and other practical considerations relative to the trial.

(2) the Middle District Court failed to consider the location of books and records and where they are kept[3]; (3) the Middle District Court erred in considering and giving weight to the factor of "possibility of delay or prejudice if transfer is granted". And most importantly the Court of Appeals reasoned; (4) the Middle District Court erred in attributing decisive weight to the plaintiff's choice of forum. The majority reasoned that "the plaintiff's choice of forum is clearly a factor to be considered but in and of itself it is neither conclusive not determinative."[4] The majority continued:

> [o]bviously, to be considered at all, the plaintiff's choice of forum must be one which is permitted under the relevant venue statute; and we have serious doubts that the plaintiff's selection of the Middle District of Louisiana was a proper venue choice in this case . . . Plaintiff postulates that this reading of the statutory language was intended by congress to permit plaintiffs in employment discrimination cases to sue their employer in judicial districts in which their employer had no connection or involvement whatsoever in order to assure that "jury pools" were not tainted by the employer's presence in the district. However, neither the plaintiff nor the Middle District Court favored us with any case citation . . . which adopts this reading. Fixing venue on a statewide basis

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3. The court of appeals failed to recognize that discovery is complete and all documents, books, and records necessary for the litigation of this matter are in the possession of counsel in Baton Rouge, Louisiana.

4. The majority citing: *Garner v. Wolfinbarger*, 433 F.2d 117, 120 (5th Cir. 1970).

> would create a field day for forum shopping by plaintiffs.

Judge Benavides rebutted the rationale of the majority in his dissent where he opined:

> the plain meaning of the relevant special venue statute, codified at 42 U.S.C. section 2000e-5(f)(3), makes clear that venue is proper in *any* judicial district in any state in which the unlawful employment discrimination occurred, which, here, includes the Middle District. *See* 42 U.S.C. section 2000e-5(f)(3) (noting that venue of Title VII suit lies in "any judicial district in the State in which the unlawful employment practice is alleged to have been committed . . . Thus, given the plain meaning of the special venue statute, venue is proper in any district in Louisiana, the state in which the alleged discrimination occurred. This sound result is neither novel nor unprecedented. *See, e.g., Richardson v. Alabama State Bd. of Educ.*, 935 F. 2d 1240, 1248 n.11 (11th Cir. 1991) ("Since the alleged discrimination took place in Georgia, appellants were free to bring suit in any of the state's three federal judicial districts."); see also *Garus v. Rose Acres Farms, Inc.*, 839 F. Supp. 563 (N.D. Ind. 1993); *Gilbert v. General Elec. Co,*. 347 F. Supp. 1058 (E.D. Va. 1972). Cf. *Thurman v. Martin Marietta Data Systems*, 596 F. Supp. 367 (M.D. Pa. 1984)."

5. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. *First*, the Fifth Circuit's judgment, establishes a new interpretation of the special venue statute of 42 U.S.C. § 2000e-5(f)(3) thereby fundamentally changing existing law affording Title VII plaintiffs the right to select the forum within the state. The majority of panelists further erred by transferring venue to the Western District Court of Louisiana as justice mandates the plaintiff not be required to litigate her sexual discrimination case under Title VII and the ADA in the defendant's "back yard" when the special venue statute was expressly enacted by Congress to prevent such an injustice.

Second, the Fifth Circuit's decision conflicts with the authoritative decisions of other United States Courts of Appeals addressing the issue. The majority decision is adverse to *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1248 n.11 (11th Cir. 1991) creating a split in the federal circuit courts.

I. The Decision Below Sets A National Rule Meriting This Court's Immediate Intervention Because It Will Cause Irreparable Harm To Plaintiffs Bringing Suit Under 42 U.S.C. § 2000e-5(f)(3).

Plaintiffs have the right to choose their forum and in this case the majority panel of the of the Fifth Circuit Court of Appeals erred in ruling that the Middle District was incorrect in honoring the plaintiff's choice of forum. The purpose of 42 U.S.C. § 2000e-5(f)(3) is to protect a special class of plaintiffs who bring suit against defendants with unlawful employment practices. 42 U.S.C. § 2000e-5(f)(3), reads in pertinent:

> (3) Each United States district court and each United States court of a place subject to the jurisdiction of

> the United States shall have jurisdiction of action brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed . . .

Clearly, the Middle District of Louisiana is a place of proper venue for applicants' action. Applicant contends the unlawful employment practices occurred in Louisiana. As the plaintiff in an employment discrimination action under Title VII and the ADA, she is entitled to select her forum within the state of Louisiana within which to bring her action. Applicant selected the Middle District to receive a fair and impartial jury. In *Peteet v. Dow Chemical Company*, 868 F.2d 1428, 1436 (5th Cir. 1989), the Fifth Circuit Court recognized "the plaintiff is generally entitled to choose the forum." This premise is especially true where, as in this case, the specific venue provisions of Title VII and the ADA clearly afford the plaintiff that right.

In *Gilbert v. General Elec. Co.*, 347 F. Supp. 1058 (E.D. Va. 1972) citing *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699 (S.D.N.Y. 1966) the court reviewed and interpreted the special venue statute. That court looked to the legislative history in an effort to ascertain whether any particular venue consideration, apart from 28 U.S.C. § 1404, were intended by Congress to allow plaintiffs the right to choose venue anywhere within the state. The court reasoned:

> The confusion with respect to this section arises from the words: . . . may be brought in any judicial district *in the State* in which the unlawful employment practice is alleged to have been

committed. If the phrase "in the state" is omitted, the section clearly means that actions shall be brought in the particular district which is the situs of the act complained of. Addition of the phrase "in the state" can result in an interpretation that the action must be brought either (1) anywhere in the appropriate state, or, (2) as if the phrase were omitted, only in the particular judicial district. The latter interpretation treats the phrase "in the state" as a surplusage without syntactical effect. General venue considerations would, without more, cause the Court to adopt the latter interpretation and to attribute the equivocal wording to poor draftsmanship. However, as heretofore noted, this is not a general venue statute and usual venue considerations do not apply, see *SEC v. Wimer, 75 F. Supp. 955, 963 (W.D. Pa. 1948).* Moreover, legislative history shows that the phrase "in the state" was *added* by the Senate to the original House version which omitted it, 110 Cong. Rec. 2511, col. 3; 110 Cong. Rec. 12814, and said addition was reflected in the remarks of Senator Humphrey during floor debate, 110 Cong. Rec. 12723, col. 3. It is apparent, therefore, that the phrase was purposely added and not merely a product of poor draftsmanship. Accordingly, the Court concludes that the phrase must be given full syntactical weight in upholding plaintiffs' contention that the section provides for a forum in any part of the state.

The court continued:

[W]hile the Court finds disturbing the suggestion that litigants may so blatantly engage in forum shopping, it does not seem inconsistent with

> Congress' militant approach to affording citizens full redress of civil rights grievances to allow plaintiffs a particularly wide latitude in choosing the situs of their litigation. Such latitude affords greater convenience to plaintiffs and enables them to avoid potential local economic and political pressures which might be believed to serve to hinder a trial judge's efforts to maintain an unfettered, impartial atmosphere.

Judge Benavides in dissent agreed with the *Gilbert* decision stating that "given the plain meaning of the special venue statute, venue is proper in any district in Louisiana, the state in which the alleged discrimination occurred. This sound result is neither novel nor unprecedented" citing *Richardson*, *supra.* Pet.App. 19a-20a.

The genesis for the venue rule in Title VII litigation is simple. In 1964 when the Civil Rights Act became law, the prevailing concern in this country was the enforcement of the equal protections of the laws and the protection of the rights of all persons to be treated equally and fairly in the workplace regardless of gender, race, national origin, or religion. In attempting to enact an enforcement mechanism that was both sensible and just, Congress saw fit to accord discrimination litigants a choice of forums to avoid the litigation of such sensitive matters in the employer's "back yard". In this case, Horseshoe is one of the largest employers in the Shreveport/Bossier area of the Western District of Louisiana. Due to Horseshoe's economic and employment contribution, high public profile, and extensive marketing budget in the Shreveport/Bossier community it would be impossible for the plaintiff to receive a fair trial from the Western District venire.

Requiring the plaintiff to litigate the case in Shreveport disregards the fundamental purpose of the special venue statute. The law only requires that venue be proper and it is not improper just because it is not the most convenient forum. According to the plain language of the special venue statute venue was proper in the Middle District. Transferring venue to the Western District based on the reasoning of the majority would change existing precedence and create a new standard of review requiring matters to be litigated in the most convenient forum and give little to no deference to the plaintiff's choice of forum. Further, a contrary interpretation renders this portion of the special venue statute superfluous. Simply put, 42 U.S.C. § 2000e-5(f)(3) is a "special venue statute". The name implies that a plaintiff fitting this special protected class has a greater right to bring a claim in a venue other than where the defendant is located or where the alleged act occurred. Accordingly, the plaintiff's right to choose a forum contemplated by the special venue statute is not forum shopping and should be respected.

It appears Congress did initially intend for the 42 U.S.C. § 2000e-5(f)(3) to be susceptible to a Section 1404(a) challenge. However, a forum non conveniens challenge to a special venue statute which allows a plaintiff to bring suit in any forum in a state would create a Section 1404(a) challenge to every suit that is filed in any venue other than where the defendant is located and doing business. Obviously, Congress intended to provide certain plaintiffs a special venue right.

II. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions Of Other Circuits.

The proceeding involves a question of exceptional importance as the panel decision is contrary to *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1248 n.11 (11th Cir. 1991) creating controversy as to the interpretation of the special venue statute necessitating the full courts consideration. 42 U.S.C. § 2000e-5(f)(3), in pertinent part reads:

> (f)(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of action brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed...

In *Richardson*, the appellants argued that the district court erred by not granting their motion to transfer the case from the Middle District of Alabama to the Northern District where all the parties were located and the alleged harm occurred. The facts in *Richardson* are identical to those in this case. In *Richardson* the plaintiff's choice of venue was upheld by the Eleventh Circuit as the court ruled not to transfer venue. The Eleventh Circuit Court concluded the Title VII venue provisions provide for filing "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed [or] in the judicial district in which the employment records relevant to such practice are maintained and administered." The Court adopted the plain meaning interpretation of 42 U.S.C. § 2000e-5(f)(3) allowing venue in any judicial district within the forum state denying the appellant's motion to transfer venue.

The Fifth Circuit's interpretation of 42 U.S.C. § 2000e-5(f)(3) is entirely contradictory to this established opinion:

> When the filing of a claim is covered by a special venue statute, as in this case, we think the venue factors set forth in that special statute are the clearest indicators of where Congress considered the best place to try an employment discrimination case. In this case those special venue factors clearly indicate that Congress thought employment discrimination controversies should be litigated in judicial districts that had direct and immediate connection with the parties, the events and the evidence bearing on their controversy. For these reasons we cannot accept the Middle District Court's interpretation of the statutory language which would support venue in the Middle District of Louisiana.[5] 305 F.3d 354, 359.

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5. The Fifth Circuit Court of Appeals deleted this section in their opinion rendered after rehearing and substituted the following: The only basis upon which the Middle District Court could be a permitted venue under the Statute is the language which states: "such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed." Assuming, without deciding, that the Middle District Court was an appropriate venue for Plaintiff's suit, we nevertheless conclude that the Middle District Court clearly erred and abused its discretion in denying Horseshoe's motion to transfer. Clearly the Middle District Court found that the criteria of "convenience of the parties and witnesses" as specified in Section 1404(a) "militated" in favor of granting the transfer in this case. Likewise the Middle District court found that the statutory venue factor of "district in which the unlawful employment is alleged to have occurred" militated in favor of transfer to the Western District. Only by considering factors which

(Cont'd)

There is much debate between the Circuit Courts as to what Congress meant when drafting the special venue statute. Certiorari is necessary for this Court to interpret 42 U.S.C. § 2000e-5(f)(3) to maintain uniformity of decisions within the Circuit Courts, to establish a final interpretation of the special venue statute and the rights afforded to a plaintiff regarding the plaintiff's choice of forum versus a defendants assertion of a more convenient forum.

(Cont'd)

are not mentioned in the special venue statue (i.e. "possibility of delay or prejudice" and "the location of counsel") and by disregarding other factors that are expressly stated in the special venue statute (i.e. Location of books and records; place where plaintiff would have worked but for the unlawful practice; and place where respondent has its principal place of business) was the Middle District Court able to create an evenly divided set of factors. If the two factors not mentioned in the venue statute are left out of the analysis and the three factors expressly mentioned in the venue statute but not considered by the Middle District Court are added into the analysis, the factors favoring transfer substantially out weight the single factor of the place where plaintiff chose to file suit. (Pet.App. 12a-13a).

CONCLUSION

The Court's majority decision to grant defendant's Motion to Transfer disregards the plain language of the special venue statute. The lower court's decision to grant the Motion to Transfer Venue to the Western District and the court's refusal to accept *Richardson*, *supra* as precedent creates a conflict between courts. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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